F & F Construction Co., Inc., and Roland L. Barker, d/b/a R. L. Barker Construction Company *and* Laborers State of Indiana District Council *and* Local Union 120 Laborers International Union of America. Cases 25-CA-8627, 25-CA-7132, and 25-CA-8156

July 8, 1982

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND MEMBERS FANNING AND ZIMMERMAN

On January 28, 1982, Administrative Law Judge Robert T. Wallace issued the attached Supplemental Decision in this proceeding. Thereafter, Respondents filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Supplemental Decision in light of the exceptions and brief and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, and hereby orders that the Respondents, F & F Construction Co., Inc., and Roland L. Barker, d/b/a R. L. Barker Construction Company, Brownsburg, Indiana, their officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

ROBERT T. WALLACE, Administrative Law Judge: These proceedings were the subject of a consolidated Decision and Order of the National Labor Relations Board, issued on May 5, 1978, in which Respondent F & F Construction Co., Inc., was ordered to make whole certain workers employed by it during a period extending from December 9, 1974, to April 1, 1979, for any loss of earnings they may have suffered as a result of its commission of unfair labor practices in violation of Section 8(a)(1), (3), (4), and (5) of the National Labor Relations Act. On April 28, 1979, the United States Court of Appeals for the Seventh Circuit entered its Judgment enforcing the Board's Order.

Subsequently, a controversy arose over implementation of the Order; and, on November 7, 1980, the Regional Director of the Board for Region 25 issued a backpay specification which, as amended, was the subject of a hearing before me at Indianapolis, Indiana, on June 15–17, 1981. Prior thereto, by an amendment effective May 18, 1981, Roland L. Barker, d/b/a R. L. Barker Construction Company, was added as a Respondent. All parties were given full opportunity to participate, to introduce evidence, to examine and cross-examine witnesses, to argue orally, and to submit written briefs. Briefs, which have been carefully considered, were filed by the General Counsel and separately by both Respondents.

Upon the entire record, and from my observation of the witnesses, I make the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. THE ISSUES

In the specification, the Regional Director alleges that approximately $840,000 (plus interest accrued to the date of payment) is due to 343[1] employees. The formula used by the Regional Director in calculating the amounts due each of those employees and the correctness of his calculations are not in dispute. Neither is the entitlement of 286 of the 343 employees. As to the remaining 57 employees, Respondent F & F contends that during the pertinent period they were employed as supervisors or in job classifications not included within the bargaining unit of employees affected by the Order; i.e., laborers, except "rodding crew," and operating engineers. In addition, Respondent R. L. Barker asserts that there is no basis in law or fact for adjudging him personally liable for compensating any of the employees of F & F. Those are the only issues present in this proceeding, and they are considered *seriatim* below.

II. ANALYSIS AND CONCLUSIONS

Based upon his analysis of the evidence, counsel for the General Counsel claims, on brief, that 33 employees are shown to be entitled to approximately $265,780 backpay.[2] As to those employees, F & F (through its president, Roland L. Barker) claims nonentitlement because 7 were foremen, 6 were mechanics, 10 were rodders, 4 were truckdrivers, 3 were concrete finishers, and 4 were, respectively, a welder, a carpenter, a policeman, and a former owner.

Before proceeding to consider evidence relating to the actual status of the 33 employees, a comment concerning "burden of proof" is appropriate. As always, that burden rests in the first instance on the moving party, here the General Counsel. But, in backpay proceedings the General Counsel has the benefit of a presumption that employees discharged or laid off as a result of unfair labor practices are entitled to some compensation, *N.L.R.B.* v.

[1] The specification contains the names of 345 employees but 2 were listed twice; i.e., Robert E. Shoulders is also listed as Eugene R. Shoulders, and Charles E. Stout and Charles F. Stout refer to the same individual.

[2] I find no basis in the record for awarding backpay to any of the remaining 24 employees for whom compensation was claimed by the Regional Director.

Mastro Plastics Corporation, 354 F.2d 170, 178 (2d Cir. 1965), cert. denied 384 U.S. 972 (1966); and a *prima facie* case is established upon a simple showing of gross amounts those employees would have received but for the employer's illegal conduct. *Virginia Electric and Power Company* v. *N.L.R.B.*, 319 U.S. 533 (1943). When such a showing has been made "the burden is upon the employer to establish facts which would . . . mitigate that liability." *N.L.R.B.* v. *Brown & Root, Inc., et al.*, 311 F.2d 447, 454 (8th Cir. 1963). In this supplemental proceeding, however, no presumption applies because eligibility for rather than the amount of backpay is at issue. Accordingly, it is incumbent on the General Counsel to provide evidence sufficient to sustain an informed determination that the 33 employees in question were within the categories of employees covered by the Board's Order; i.e., laborers (except rodding crew) or operating engineers.

A. *Status of Employees*

Seven employees are shown to have worked for F & F as "foremen" of crews of laborers. Of those, five (Fred Wilson, Ralph Bonar, Sam Mynatt, Troy Sweet, and Virgil McCloud) were never told they had, nor did they exercise, any of the attributes of supervisors set forth in Section 2(11) of the Act. Typically, their crews ranged in size from two to eight men, and they spent virtually all of their time doing the same work performed by crewmembers; e.g., shoveling dirt, using jackhammers, laying pipes, and pouring concrete. They did not read blueprints and their instructions to crewmembers were minimal since jobs were repetitive and most of the men knew how to accomplish given tasks. They were paid on an hourly basis and had no authority to hire, fire, discipline, or reward employees, nor could they assign men to particular crews. When discipline arose, invariably they referred the involved employees to Roland Barker and he determined what, if any, punishment was appropriate. In these circumstances, I find that the named individuals were in fact laborers.[3] However, in the case of the remaining two "foremen," I find that one (Sam Sproles) possessed throughout the pertinent period one or more characteristics of a supervisor and that the other (Max Miller) worked as a laborer through April 7, 1975, and thereafter had supervisory responsibilities.

Seven employees are shown to have had involvement with F & F's repair facility during the pertinent period. Of those, two (Clifford Jarrett and Robert Wiggington) performed no work on vehicles or equipment. The former worked full-time on "yard cleaning" (e.g., stacking lumber and pipes); and the latter spent 10 percent of his time doing similar yardwork and he spent the rest of his worktime using a jackhammer digging trenches for conduit. It also appears from the testimony of Charles Hamstra and Troy Sweet that the situation of Gene Wiggington was similar to that of this nephew Robert. Accordingly, the two Wiggingtons and Jarrett are found to be laborers. Of the remaining four individuals three were mechanics and one was a welder. Two of the mechanics (Ronald Hendershot and William Myers) worked primarily on equipment (dump trucks) not ordinarily manned by operating engineers and, therefore, are found to lack entitlement under the Board's Order. However, the third mechanic (Charles Hamstra) and the welder (Gregory Zents) are shown to have spent substantial portions of their time working on field equipment and so reproperly classified as operating engineers under the applicable collective-bargaining agreement with Local Union No. 103 of the Operating Engineers.

Ten workers[4] assertedly were members of rodding crews engaging in cleaning operations involving insertion of metal rods through conduits. Assuming that "rodders" are not in fact laborers, the evidence shows that the 10 individuals did rodding work only sporadically and that they spent most of their time digging ditches, using jackhammers, and performing other work typically of a kind normally performed by laborers. Accordingly, I conclude that they were laborers within the meaning of the Board's Order. Similarly, two men (Canada Boyd and Roosevelt McKinney) claimed to have been concrete finishers are shown to have spent very little of their time actually finishing concrete. Instead, their primary work was that of laborers. The same is true with regard to the four[5] alleged truckdrivers. Over their respective employment periods, driving jobs were relatively infrequent and even then were incident to their work as laborers.

James Proctor worked for F & F during a 3-week period. He dug ditches, shoveled concrete, and used a rake. He did no carpentry work as alleged.

The final two employees whose status is in question are James Hammer and Frank Jones. The former is alleged to have worked for F & F in the capacity of traffic policeman and the latter is claimed to lack entitlement to any backpay because he was a former owner of F & F. Although neither appeared at the hearing it appears from the testimony (1) of Robert Walters that Hammer was a policeman who, when off-duty, worked as a member of a crew of laborers and, as need arose, donned his uniform and directed traffic, a function that was performed by other members of the crew in his absence; and (2) of Respondent Roland Barker that Jones worked for F & F as an operating engineer during the third quarter of 1978, a period long after he had ceased to have any ownership interest in that Company. Accordingly, I conclude that Hammer and Jones worked, respectively, as laborer and operating engineer within the pertinent period.

B. *Alter Ego Issue*

The unfair labor practices for which F & F was found responsible in the Board's decision were committed while Roland Barker was F & F's sole owner, president, and official in charge of day-to-day operations, e.g., hiring, formation of work crews, and discipline. Indeed, he is shown in that decision to have been the supervisor who effectuated most of those practices. However, he

[3] Although Ralph Bonar did not appear at the hearing, the testimony of Fred Wilson warrants an inference that the former performed the same functions and had the same responsibilities as the latter.

[4] Roger Brown, Charles Kernodle, Maurice Malicoat, Robert Mitchell, Ralph Mynatt, Bobby Ray Shoulders, Robert E. Shoulders, Paul Stierwalt, Craig Tucker, and Terry Wilber.

[5] Roger Fordyce, John Hopkins, Larry Roberts, and George Stevens.

was not named as a respondent either in the unfair labor practice charge or in the original complaint. He continued as sole owner and chief operating official of F & F until March 1, 1979. On that date, approximately 8 weeks before the court of appeals affirmed the Board's decision, he caused F & F to cease doing business and simultaneously advised customers that services would continue to be provided by him as an individual doing business as R. L. Barker Construction Company. Thus, in a circular-type letter dated March 1, 1979, sent to the customer from whom F & F received approximately 90 percent of its revenues in 1978 (Indiana Bell Telephone Co.), he stated:

> This is to inform you that at the end of February 1979, we have ceased doing business as "F & F CONSTRUCTION COMPANY, INC." Beginning *March 1, 1979*, a new company is being formed and will be known as "R. L. BARKER CONSTRUCTION COMPANY."
>
> We will be at this same location, 1605 N. Country Club Road, Indianapolis, Indiana, until our new building is completed, hopefully, the latter part of spring. We will be moving to Brownsburg, Indiana, on St. Rd. 136E.
>
> Our New mailing address will be "P.O. Box 125 Brownsburg, Indiana, 46112." However, we will still be using our post office in Speedway, Indiana, until we have completed and cleared up all of our business transactions with "F & F CONSTRUCTION COMPANY, INC."
>
> We will keep the phone number 271-*2821* while we are here at this location, however, approximately, the 16th of March, we are changing the number 271-*3642* to our new Brownsburg number *852-8979*.
>
> We wish to thank you for your business and if you should have any questions concerning the above, please feel free to contact us.

Enclosed with that letter was a detailed listing of his rates for labor and use of construction equipment which was identical to F & F's then current schedule of rates.

The asserted reason for discontinuance of operations by F & F is that Barker felt that customers still persisted in identifying that Company with its former owners (*F*rank Jones and *F*indley Davidson) and he wanted the public to know that he was in control of operations.

As an individual proprietor, Barker performed essentially the same construction services that had been provided by F & F, using the same type of equipment and many of the same employees. As contrasted with F & F, however, only 50 percent of his total revenues in 1979 and 1980 ($456,061 and $431,264, respectively) were derived from pipelaying operations for Indiana Bell. The other 50 percent was obtained through an expansion of residential-type work, such as pouring asphalt for driveways, building swimming pools, and constructing septic systems. In addition, Barker's construction services were performed generally within a 50-mile radius of Indianapolis, whereas F & F operated on a statewide basis. Barker opened a swimming pool supply store at his new facility in Brownsburg and made his repair shop at that location available to the general public for auto body work. Although Barker's brother (Eugene) served as secretary/treasurer of F & F, the latter had no involvement with Barker Construction Company.

At the time of the hearing herein, F & F held as its only asset an unspecified amount representing proceeds from sale of its office/garage facility in Indianapolis.

In these circumstances, I have no hesitation in concluding that Roland Barker, d/b/a R. L. Barker Construction Company, is simply "another face" or the *alter ego* of F & F. Barker is shown as sole owner and chief operating official of both companies, and in the latter capacity was the supervisor responsible for most of the unfair labor practices found in the Board's decision. Subsequent to that decision he chose to discontinue operations of F & F and proceeded immediately to perform essentially the same operations as an individual proprietor. In effect, this entailed "a mere technical change in the structure or identity of the employing entity . . . to avoid the effect of the labor laws," and Barker "is in reality the same employer and is subject to all the legal and contractual obligations of the predecessor." *Howard Johnson Co., Inc.* v. *Detroit Local Joint Executive Board, Hotel & Restaurant Employees & Bartenders International Union, AFL-CIO*, 417 U.S. 249, fn. 5 (1974).

Respondent Barker also contends that the Board lacks jurisdiction over him because his proprietary operations are not shown to have been performed "in commerce" or "to have affected commerce" as those terms are defined in Section 2(6) and (7) of the Act. But, such a showing is not necessary where, as here, Barker is found to be the *alter ego* of Respondent F & F. As such he is derivatively liable for backpay due discriminatees resulting from unfair labor practices of F & F. In fact, however, I find that the requisite jurisdictional showing has been made since Barker received in excess of $50,000 annually for services performed for an employer (Indiana Bell) which provides a link in the interstate telecommunications network. See Jurisdictional Standards, issued October 2, 1958, as amended.

Finally, citing *Rose Knitting Mills, Inc., and Boclaire Fabrics, Inc.*, 237 NLRB 1382 (1978), Barker argues that the case against him should be dismissed because he was not made a respondent herein until 1 month before the hearing in this supplemental proceeding. However, in *Southeastern Envelope Co., Inc., et al.*, 246 NLRB 423 (1979), the Board reversed *Rose Knitting Mills* to the extent it differed from prior policy as expressed in *Coast Delivery Service, Inc.*, 198 NLRB 1026, 1027 (1972), and it quoted with approval language in the latter decision, as follows:

> It is well established that liability for backpay . . . may be imposed upon a party to a supplemental proceeding, even though [it] had not been a party to the proceeding in which the unfair labor practices were found if [it] was sufficiently closely related to the party . . . [which] committed the unfair labor practices . . . .

Here, Barker's relationship to F & F has been found to be that of an *alter ego*. In addition, the principal inequity perceived in *Rose Knitting Mills* does not exist here because Barker did not establish his proprietary business until long after issuance of the Board's decision in the unfair labor practice case. Further, and wholly apart from nonapplicability of the doctrine of laches as a defense to a backpay obligation *(N.L.R.B.* v. *J. H. Rutter-Rex Manufacturing Company, Inc.*, 396 U.S. 258 (1969)), the Regional Director here appears to have moved to amend the backpay specification with due diligence after learning of the proprietary operations, and Barker had ample notice and opportunity to address the *alter ego* issue in this proceeding.

ORDER[6]

The Respondents, F & F Construction Co., Inc., and Roland L. Barker, d/b/a R. L. Barker Construction Company, Brownsburg, Indiana, their officers, agents, successors, and assigns, shall pay to the discriminatees listed on pages 141 through 144 of the amended backpay specification the amounts (plus interest thereon accrued to the date of payment as specified in *Florida Steel Corporation*, 231 NLRB 651 (1977), and *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962), minus any tax withholdings required by Federal or state laws) there set forth next to their names, except (1) that the amount due Max Miller shall be recomputed to include only compensation for work performed up to and including April 7, 1975, with interest, and (2) that no backpay is required to be paid to the following individuals:

Donald Adams	William Rudy Myers
Donald R. Adams, Sr.	Eugene Napier
Dennis Barker	Frank L. Napier
Scott Barker	Lige Napier, Jr.
David Cassell	Carlton Robinson
Gene Cassell	Eugene A. Smith
David A. Caudill	Sam Sproles
Johny Culcross	Robert J. Stokes
Donald Downs	Charles E. Stout
John T. Guy	Wayne R. Stwalley
Ronald C. Hendershot	Kermit Walker
Glen Lewis	Robert Walters
Johnnie C. Malicoat	Gilbert Yentes
William P. Malicoat	

IT IS FURTHER ORDERED that the amended backpay specification be an is hereby dismissed as to the individuals named immediately above.

[6] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.